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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 110.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS, NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.

CHARLES B. MAHIN,
134 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for National Woodwork Manufacturers Association, et al.

Of Counsel:
RICHARD S. RATCLIFF,
JOHN A. McDONALD,
SPRAY, PRICE, HOUGH & CUSHMAN,
Chicago, Illinois 60603.

THE CHANDLER-SHERIDAN PRINTING COMPANY, CHICAGO

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A. The Board Has Not Justified and Has Virtually Abandoned the Erroneous "Control" Rationale of Its Decision Below.

The Board's Brief in No. 110, this Term, seeks to rationalize and justify its finding below that the Union's boycott of prefabricated doors on the Frouge job did not violate Section 8(b)(4)(B), whereas like Union boycotts of prefabricated doors on the McDonnell, Driscoll and Nason jobs violated Section 8(b)(4)(B).

The sole basis of differentiation in the Board's decision below was the so-called factor of "control", which the Board found to be determinative *per se* of non-violation on the Frouge job.[1] This is not a valid basis of distinction.

The fallacy of the Board's "control" concept is that under the Statute it is the existence of *an* actual boycott objective which is determinative of violation, not the incidental factor of the contractual freedom of any particular employer to capitulate.

In respect of the Union's boycott of prefabricated doors on the McDonnell, Driscoll and Nason jobs, the Board found (R. 29): "Thus, the real targets of the District Council's conduct were the respective owners of the three projects, the mill suppliers, and the door manufacturers", and the Court found (R. 163): "In the case at bar the Union's target was and is prefabricated doors."

It is clear that the Union had exactly the same proscribed objective of boycotting prefabricated doors on the Frouge job as on the other jobs. Not only did Rule 17 by its terms prohibit prefabricated doors *on all four jobs*, but the Union, by its enforcement of Rule 17, actually prevented the use of prefabricated doors *on all four jobs*. The only way the Union's goal under Rule 17 could be accomplished was to force Frouge to stop handling prefabricated doors—which it did.[2]

The fallacy of the Board's application of its "control" theory in this case is set forth in NWMA's Brief in No. 110 at pages 46 to 52 and is not repeated here.

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1. See Record, pp. 11-16, 28-30 and n. 21. Contrary to the Board's contention here (Board Br. No. 110, p. 4, lines 3-9), its decision in respect of Section 8(b)(4)(B) was not based on "work preservation" rationale—that term is not even mentioned in the Board's Section 8(b)(4)(B) findings.

2. Frouge was forced to dispose elsewhere of 600 doors which were already on the job finished and ready for installation (R. 95).

Significantly, in its present Brief in No. 110, the Board appears to have virtually abandoned the "control" theory (which was the *sole* basis of its Frouge finding below) insofar as its application in this case is concerned, and now seeks to justify the Union's boycott of prefabricated doors on the Frouge job on the entirely different rationale of "work preservation".[3] In other words, the Board is here trying to sustain its Section 8(b)(4)(B) finding of no violation on the Frouge job on a *ratio decidendi* entirely different from its decision below.[4]

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3. Board Br. No. 110, 19:

"... The Board found the activity directed against Frogue [sic] to be primary because all of the circumstances indicated that the Union's objective was to preserve work for the Frouge employees, rather than to further a dispute with the door manufacturer or some other person.[13]..."

"13. So viewed, the presence or absence of 'control' is not determinative, but, rather, is merely some indicium, or a criterion, along with others, for deciding whether certain activity is primary or secondary. In some situations the factor of control may be more relevant than in others, and in some cases the factor should probably be accorded but little weight."

4. Compare, *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 443, 444 (1965), wherein this Court said that, "... the integrity of the administrative process requires that 'Courts may not accept appellate counsel's *post hoc* rationalizations for agency action'..."

B. The Union's Desire to Preserve Work and the Absence of a Union Dispute With Door Manufacturers Did Not Immunize Its Unlawful Boycott of Prefabricated Doors Under Section 8(b)(4)(B).

The Board in its present Brief argues that Section 8(b)(4)(B) does not apply to "primary disputes" and that the Union's boycott of prefabricated doors on the Frouge job was only primary because (1) the Union's objective was "work preservation" and (2) the Union had no "primary" dispute with the manufacturers and distributors of the boycotted doors.

In urging these new contentions to this Court, the Board is reversing the position that it and the courts have consistently taken since Section 8(b)(4)(B) (then (A)) was enacted in 1947. As demonstrated in NWMA's Briefs herein (No. 110, pages 35 to 45; No. 111, pages 36 to 42), it has been consistently held that (given the requisite inducement of employees or coercion of an employer) the crux of a Section 8(b)(4)(B) violation is the existence of *an* unlawful boycott objective. In product boycott cases, a union motive of self-interest—such as work preservation—has never been held to be a defense, and the existence of a dispute with a so-called "primary" employer has never been considered a requisite of violation.

It would be difficult to find a more pertinent and compelling answer to the Board's present contention than its own findings of Section 8(b)(4)(B) violation regarding the McDonnell, Driscoll and Nason jobs below. On all three jobs (and on the Frouge job) the Union's objective of work preservation was exactly the same. On all three jobs (and on the Frouge job) the boycotts of prefabricated doors were accomplished by enforcement of the same Rule 17. On none of the three jobs (nor in Frouge's case) did the boycotting union have any relation with the manufacturers

or distributors of the doors or any specific disputes with them—the Union's objection was to the prefabricated condition of the doors. Thus, on all four jobs the factors which the Board now says are controlling (i.e., work preservation and absence of disputes with manufacturers) were the same. It is therefore pertinent to quote the Board's statements to the Court below in supporting its Section 8(b)(4)(B) findings of violation:[5]

> "Council's argument (Brief pp. 26-28), that evidence of an active dispute between a union and an employer is required to establish that a refusal to perform services for another employer violates Section 8(b)(4)(B) ignores controlling precedents rejecting that contention. In *N. L. R. B.* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932 (C. A. 6), the striking union never communicated with the door producers whose products it refused to handle; and it argued, as does Council here, that it therefore could not have violated the Act. The Board and the court of appeals disagreed. The court wrote (242 F. 2d at 934-935):
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> > "The fact that there was no active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents from the terms of . . . [8(b)(4)(B)] of the Act, which neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. *N. L. R. B.* v. *Washington Oregon Shingle Weavers' Dist. Council*, 9 Cir., 211 F. 2d 149, 152-153."

Further, answering the Union's argument below that the Union's objective was work preservation and pay for loss of work, the Board pointed out that the existence of a lawful objective was not a defense because the Union's refusal to handle prefabricated doors was unlawful, stating that ". . . it is settled law that if *an* object of a union's

5. Board's Reply Br. (p. 14) in *NWMA* v. *NLRB*, 354 F. 2d 594 (7th Cir. 1965) (Nos. 14904, 14988 and 15064).

activity is unlawful, other lawful objectives do not insulate its conduct from the reach of 8(b)(4)(B). *N. L. R. B.* v. *Denver Bldg. & Constr. Trades Council*, 341 U. S. 675, 680; *N. L. R. B.* v. *Local 74, United Brotherhood of Carpenters*, 341 U. S. 707, 713. Indeed, even if Council's ultimate objective were lawful, 'a finding of an illegal intermediate objective is all that is required.' . . .'"[6]

As pointed out in NWMA Briefs, in No. 110 at pages 29 to 52, and in No. 111 at pages 36 to 42, the Board's above-quoted statements of the law are correct.

The Board's attempt (at pages 12 to 15 of its Brief in No. 110) to square its "work preservation-primary dispute" theory with the legislative history of Section 8(b)(4)(B) (then (A)) and the many cases applying that section flies directly in the face of the Statute and long recognized Congressional intention.[7]

Although many of the examples referred to by Congress in enacting Section 8(b)(4)(B) involved situations where the unions struck so-called neutral "secondary" employers in furtherance of active disputes with "primary" employers, the intended proscriptions were not limited to such situations.[8] As pointed out by the Court below (R. 162, 163), a commonly cited reason for the Taft-Hartley Act's ban on secondary boycotts was Electrical Worker's (Local No. 3) product boycott in *Allen Bradley*.[9] The Electrical Union's refusal to install prefabricated electrical fixtures made and assembled outside of New York City

6. *Ibid.*, p. 16.

7. The Board and the Courts have repeatedly pointed out that Section 8(b)(4)(B) is not susceptible to formularism under a rigid primary-secondary dichotomy. See NWMA Br. No. 110, 35-45 and No. 111, 36-42.

8. See, NWMA Br. No. 110, 29-41, and Br. of Amicus Associated General Contractors of America, et al., 43-50.

9. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797 (1945).

was not based on any dispute with the out-of-state manufacturers nor did it have any interest in the working conditions or union status at such factories—the union even banned products made by members of its sister local in New Jersey.[10] Further, contrary to the Board's contention (Board's Brief in No. 110, page 12), the Union's clear purpose was to retain or make work for its members.[11]

Therefore, contrary to the Board, Congress intended Section 8(b)(4)(B) to outlaw product boycotts regardless of the union's desire to preserve work and the absence of any dispute with the manufacturer of the boycotted product.

Also contrary to the Board (Board's Brief in No. 110, pages 13 to 15), neither the existence of a union's work preservation objective nor the absence of a dispute with the manufacturers of boycotted products has been held to be a defense in Section 8(b)(4)(B) cases.[12] The controlling criterion has always been held to be the existence of *a* proscribed objective of boycotting the products of another manufacturer, whether or not there are other lawful objectives.[13]

In its present effort to write a rigid primary-secondary formula into Section 8(b)(4)(B), the Board falls into the same error as it did in its "control" finding below. That is,

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10. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 41 F. Supp. 727, 734, 736 (S. D. N. Y. 1941).

11. This Court explained in *Allen Bradley* that the union was "prompted by a desire to get and hold jobs for themselves at good wages" (325 U. S. at 798) and a purpose was "to enlarge employment opportunities" and "to make more work for its members" (325 U. S. at 799). The Second Circuit in *Allen Bradley* (145 F. 2d 215, 220 (1944)) summed up the union's purpose the same way, stating, "In other words it was a make-work campaign for the benefit of union members."

12. NWMA Br. No. 110, 35-41.

13. *NLRB* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 689 (1951).

it fails to take into account and give recognition to the fact that in product boycott situations a union may have (and almost always does have) mixed or dual objectives. Below, the Board viewed "control" as conclusively determinative that the Union's *sole* objective was a primary dispute with Frouge. It dogmatically closed its eyes to the Union's patent other objective—the boycott of prefabricated doors.[14] Similarly, in its present Brief, the Board's fixation on work preservation has led it erroneously to ignore the Union's companion (and enabling) objective of boycotting prefabricated doors.[15]

The other facet of the Board's present argument—that the boycotting union must be motivated by some dispute or difference with the manufacturer of the black-listed product—ignores the embargo impact of a product boycott. It is apparent that the embargo impact is the same, whether the boycotting union bans the product because it is not made by its own members, or by members of a sister or some other union, or is not made under so-called "standard" conditions, or is in a condition of manufacture objectionable to the boycotting union. The crux of the unlawfulness of all these boycotts is that the union, for some reason satisfactory to it (usually some form of self-interest), is boycotting in the hands of the immediate employer, products made by another employer. Regardless of the union's reason, the union's target is the boycotted products and those who manufacture and distribute them.[16] And this is true whether the target is a particular employer

14. An objective which the Board had no difficulty or hesitancy in recognizing in respect of the other three jobs.

15. See quotations from *The Martin Company*, 131 NLRB 1010, 1018 (1961) and *MacDonald-Scott & Associates*, 131 NLRB 787, 800 (1961) in NWMA Br. No. 111, 41.

16. When a boycotting union black-lists a product as "hot", the product becomes "hot" not because of the union's particular reason for objection, but because the union will strike to prevent the handling of the "hot" product.

with whom the union has a dispute (as in *Wadsworth*),[17] or is a product which does not bear a union label (as in *Sand Door*[18] and *Sound Shingle*),[19] or is a product prefabricated or manufactured by other than a local union's members (as in *Allen Bradley*,[20] *Joliet Contractors*,[21] *General Millwork*,[22] *MacDonald-Scott*,[23] *Martin*[24] and the present case).

The Board argues, at pages 9 and 10 of its Brief, that Section 8(b)(4)(B) cannot be read literally because it would then ban all primary strikes. But this is not a relevant argument here. It is true, of course, that this Section does not outlaw primary strikes merely because of the incidental effect that a primary strike may have on relations between the struck employer and his suppliers and customers.[25] But, this does not mean that the Board is free to depart from the plain language of the Act in other situations and to write in its own limitations and exemptions, as it seeks to do here.

As this Court has repeatedly pointed out, the key to

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17. *Wadsworth Building Company*, 81 NLRB 802 (1949), enfd. 184 F. 2d 60 (10th Cir. 1950).

18. *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U. S. 93 (1958).

19. *Sound Shingle Co.*, 101 NLRB 1159 (1952), enfd. 211 F. 2d 149 (9th Cir. 1954).

20. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797 (1945).

21. *Joliet Contractors Association* v. *NLRB*, 193 F. 2d 833 (7th Cir. 1952); *Idem*, 202 F. 2d 606 (7th Cir. 1953), cert. den. 346 U. S. 824 (1953).

22. *NLRB* v. *Local 11, Etc.*, 242 F. 2d 932 (6th Cir. 1957).

23. *MacDonald-Scott & Associates*, 131 NLRB 787 (1961).

24. *The Martin Company*, 131 NLRB 1010 (1961).

25. This was implicit in the original Act (*NLRB* v. *International Rice Milling Co.*, 341 U. S. 665 (1951)), and was made explicit in the 1959 amendments to avoid any contention that the Section was being changed to outlaw conventional "primary" strikes (NWMA Brief No. 110, 41-45).

Section 8(b)(4)(B) is the ascertainment of the Union's objectives. In the usual primary strike, for recognition or over wages or working conditions, a boycott of the products of others is not the subject matter or an issue of the strike. Interference with the struck employer's relations with others or with the handling of their products is incidental and temporary, and ends when the strike is settled. However, when *the boycott of the products of others is the subject matter of the strike,* the boycott objective is not incidental, but is *"the,"* or at least *"an,"* objective of the strike. *The struck employer is powerless to grant the union's demands, except by boycotting the products of others.* The whole controversy contemplates a continuing embargo of the black-listed products.

Thus, in the present case, on all jobs (including Frouge) the boycott of prefabricated doors was not an incidental effect of a "primary" strike—the boycott was the whole subject matter—the core of the work refusal. Contractors throughout all Philadelphia were powerless to satisfy the Union's demands, except by a continuing boycott of prefabricated doors manufactured by Petitioners and other employers elsewhere. This was an objective proscribed by Section 8(b)(4)(B).

C. Contrary to the Board, in Its Enactment of Section 8(b)(4)(B) Congress Was Concerned With the Adverse Effect of Product Boycotts on the Economy and the Public Interest and This Is Also a Proper Concern of This Court in the Present Case.

At pages 22 to 26 of its Brief the Board argues that this Court should not be concerned with the adverse economic effects and public detriment which result from product boycotts such as the Union enforced in this case, and suggests that such matters should be more appropriately ad-

dressed to Congress. The answer to this is that Congress has already addressed itself to this problem of product boycotts and by the enactment of Section 8(b)(4)(B) intended to outlaw such boycotts. It is the position of NWMA and supporting Amici that the new "work preservation" boycott immunity, which the Board seeks to write into the Act, is contrary to the Statute and the Congressional intent.

It is abundantly clear that Congress was concerned with the adverse economic consequences and effect on the public interest of product boycotts. (See, NWMA Brief in No. 110, page 52, footnote 76). A basic purpose of the Act, as stated in Section 1 thereof, was to prevent obstructions to the full flow of goods in commerce and "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the public welfare". As stated, the embargo effect of the union's boycott of "foreign" products in *Allen Bradley*[26] was repeatedly said to be a prime reason for Section 8(b)(4) itself (NWMA Brief in No. 110, pages 59 to 68). In *International Rice Milling*,[27] this Court pointed out that Section 8(b)(4) requires consideration of the Congressional policy "to preserve a competitive business economy" as well as a preservation of the rights of Labor.

Moreover, it is fundamental that "the social and economic factors giving rise to the legislation, and the effect that a possible interpretation will have upon society" warrant consideration.[28]

Contrary to the Board's depreciation of the economic and technological advantages of prefabricated doors

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26. *Allen-Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797 (1945).

27. *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, 673 n. 7 (1951).

28. *Sutherland, Statutory Construction*, Vol. 3, p. 154 (Horack, 3d Ed. 1943).

(Board's Brief in No. 110, page 23, footnote 17), the United States Department of Labor has recently confirmed the substantial advantages of such products.[29]

Respectfully submitted,

CHARLES B. MAHIN,
134 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for National Woodwork Manufacturers Association, et al.

Of Counsel:
RICHARD S. RATCLIFF,
JOHN A. MCDONALD,
SPRAY, PRICE, HOUGH & CUSHMAN,
Chicago, Illinois 60603.

Date: January 4, 1967.

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29. *Technological Trends in Major American Industries, United States Department of Labor Bulletin No. 1474* (1966), p. 35: "Among the major factors contributing to this advancing trend toward prefabrication are the significant savings possible in time, materials and on-site labor requirements, the higher degree of quality control possible in factories, and the greater opportunities for economies of large-scale production and mass-production techniques in construction. *For example, a carpenter can install a complete prefabricated door (prehung in its frame with hardware attached) in about one-tenth to one-sixth the time usually required to hang a door in the conventional manner.* According to one home-builder, the walls and roof of a conventional wood-framed house which require about 500 man-hours to build on-site, can, with prefabricated components, be built (including off-site manufacture of components and on-site erection) in 200 man-hours or less." (Emphasis added.)